UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, June 15, 1956

Before HON. J. EARL MAJOR, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBURG, *Circuit Judge*

[CAPTION.]

This cause came on to be heard on the question of the impact, if any, of the Coca Cola Company decision of the Supreme Court of the United States on the opinion of this court heretofore filed on November 10, 1955 in this cause, the petition for review of an order of the National Labor Relations Board entered therein on January 28, 1955, the answer and request for enforcement of said order, and the certified transcript of record, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this court that the opinion of this court heretofore filed on November 10, 1955 be withdrawn and the opinion of this court filed this day be substituted therefor.

It is further ordered and adjudged by this court that the order of the National Labor Relations Board entered therein on January 28, 1955 be, and the same is hereby set aside and vacated, and the request of the National Labor Relations Board for enforcement of said order is hereby denied.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, December 19, 1955

Before HON. J. EARL MAJOR, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBURG, *Circuit Judge*

[CAPTION.]

It is ordered that Motion of United Electrical, Radio and Machine Workers of America (UE), and Local 1114 United Electrical, Radio and Machine Workers of America (UE), successor to Local 1150 United Electrical, Radio and Machine Workers of America (UE), for leave to intervene and for leave to file petition for rehearing be DENIED.

APPENDIX B

Opinions of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11403 OCTOBER TERM AND SESSION, 1955.

[CAPTION.]

November 10, 1955.

Before MAJOR, LINDLEY and SCHNACKENBURG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition to review and set aside an order of the National Labor Relations Board, entered January 28, 1955, against Goodman Manufacturing Company of Chicago, Illinois. By the Board's order, petitioner was found guilty of an unfair labor practice under § 8(a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. A. § 158(a)(5) and (1), because of its refusal to bargain with the United Electrical, Radio and Machine Workers of America as the exclusive representatives of certain of petitioner's employees who are in what the Board had determined to be the "appropriate unit." Petitioner was ordered to cease and desist from the unfair practice and to take the customary affirmative steps to give effect to the Board's order. By its answer the Board requested enforcement of its order.

The composition of the "appropriate unit" is the generating cause of this controversy. The facts from which the controversy developed are these: In 1944, United Electrical, Radio and Machine Workers of America (here-

inafter called the International) was certified as the exclusive bargaining agent for certain factory production and maintenance employees at petitioner's Chicago plant. At that time, the Board determined that the employees who were then styled "timekeeping clerks" should not be included in the bargaining unit. Subsequently, in 1951, upon a petition filed by the International, the Board changed its position. Over petitioner's objections, the Board decided that these timekeeping clerks or "timekeepers," as they are presently styled, could be appropriately included in the previously certified bargaining unit if they so desired. Two elections were held in which the timekepers were permitted to choose either to be included in the unit with the production and maintenance workers or to have no collective bargaining representation. The record does not show the results of the first election, although it is stated in the Board's brief that all of the timekeepers voted for inclusion. In the second election, the result of which was certified on September 17, 1952, a majority of the timekeepers again voted for inclusion. After the second election, petitioner refused to bargain with Local No. 1150 of the International (hereinafter called the Local Union) as the timekeepers' representative. On November 19, 1952, the Local Union charged petitioner with unfair labor practices and on February 5, 1953, the general counsel of the Board issued a complaint.

Throughout these proceedings petitioner has sought to justify its refusal to bargain on two grounds. The first is the claimed impropriety of the Board's inclusion of the timekeepers in the bargaining unit with the production and maintenance workers. The timekeepers, says petitioner, are an echelon of management, and the Board's action creates a serious situation of divided loyalties and is so arbitrary and unreasonable as to be unlawful. The second ground is the asserted non-compliance by the International, District Council No. 11 of the U. E. R. & M. W. A., and the Local Union with the non-communist affidavit provision

added to the National Labor Relations Act in 1947, 29 U. S. C. A. § 159(h). The statute requires that local union officers and the officers of any labor organization with which the local is affiliated file non-communist affidavits as a prerequisite to the Board's authority to issue a complaint. The District Secretaries and Trustees of the International, at times relevant to this unfair labor practice proceeding, had not filed such affidavits. These officials, according to petitioner, are officers within the meaning of the statute; hence, the charge of non-compliance.

The first of these grounds directly involves the substantive merits of the controversy, while the second is jurisdictional in character. Accordingly, we should first direct our attention to the second ground because it has been definitely settled that a valid complaint, arising from a local union's charge of an unfair labor practice, may be issued against an employer only if the statute's anti-communist requirement has been satisfied. *N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *N. L. R. B.* v. *Dant et al.*, 344 U. S. 375; *N. L. R. B.* v. *Atlanta Metallic Casket Co.*, 205 F. 2d 931.

When specific application is made of this general proposition, the question arises as to how and by whom it is to be determined whether there is such compliance. The Board contends that the matter is one for its own exclusive administrative determination, and that an employer may not litigate the compliance issue in an unfair labor practice proceeding. Considerations based on the policy of the National Labor Relations Act lend some weight to this argument. The effective administration of the Act and the disposition of unfair labor practice charges should not be unnecessarily hampered or delayed. Nevertheless, the Board's present contention is too broad, for the Supreme Court has recognized that under some circumstances there may properly be judicial review of a union's compliance status.

In *N. L. R. B.* v. *Highland Park Mfg. Co., supra,* after holding that the C. I. O. was a labor organization, the Supreme Court affirmed the decision of the Court of Appeals which denied enforcement of a Labor Board order requiring the employer to bargain. The basis for the decision was the admitted fact that certain national officers of the C. I. O. had not filed non-communist affidavits at times relevant to those proceedings. To be sure, the language of the *Highland Park* opinion (page 325) indicated that there are limits upon the scope of judicial review:

> "If there were dispute as to whether the C. I. O. had filed the required affidavits or whether the documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented."

But the opinion concluded (pages 325-326) with the positive statement:

> "We think * * * that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

A number of decisions by Courts of Appeals since the *Highland Park* case have developed more definite limits on the scope of judicial review of the matter of compliance. It appears that courts ought not inquire into the factual or merely formal aspects thereof. Thus, in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, it was held that the "veracity" of a non-communist affidavit, admittedly filed, could not be litigated in an unfair labor practice proceeding. Similarly, in *N. L. R. B.* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, the issue of "the truthfulness of the affidavits" or "whether the ostensible officers filing them are the true directors of the union involved" were outside the scope of judicial review; however, express

recognition was made of the point that a different situation would have been presented if there had been "no ostensible compliance." This court, in *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. 2d 47, noted the distinction between "the *fact* of compliance," which is not litigable, and "the *necessity* of compliance, which was the issue involved in *N. L. R. B.* v. *Highland Park Mfg. Co.*"

To be contrasted with these cases is *N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, 219 F. 2d 441 (cert. granted, No. 79, 24 Law Week 3039, October 11, 1955), wherein the Court of Appeals for the Sixth Circuit, notwithstanding the Board's contention that such a matter could not be litigated by the employer, ordered the Board's trial examiner to take evidence with respect to the status and jurisdiction of one Taylor, the C. I. O. Regional Director for Kentucky, who admittedly had not filed a non-communist affidavit. The court's order was based squarely on the employer's right to a judicial review of the substantial legal aspects of the compliance issue, and it cited as authority the *Highland Park Mfg. Co.* case. We are aware, as noted, that the Supreme Court has granted a writ of certiorari in the *Coca-Cola Bottling Co.* case. However, since we think that the statement of the law therein is correct and not in conflict with those decisions holding that the factual and formal aspects of compliance are outside the scope of judicial review, we see no occasion to defer a *decision* in the instant case.

Under these authorities, the instant case appears to be one where judicial inquiry into the union's compliance status is proper. Here, as in the *Highland Park Mfg. Co.* and *Coca-Cola Bottling Co.* cases, there is no dispute that the union officials who petitioner claims are "officers" within the statutory meaning had not filed non-communist affidavits at relevant times. Indeed, there is no factual disagreement at all, but only a disagreement concerning the Board's conclusions from admitted facts. And if petitioner's claim that the Board reached incorrect conclusions

is well founded, then there is no legal basis for the unfair labor practice proceeding.

The Board determined, in a separate administrative proceeding, that neither the District Secretaries nor the Trustees of the International were officers within the meaning of 29 U. S. C. A. § 159(h). With respect to the District Secretaries, this determination was said to be based upon an earlier Labor Board decision, *Sunbeam Corporation*, 98 NLRB 525. With respect to the Trustees, the conclusion was reached under § 102.13(b)(3) of the Board's Rules and Regulations which, subject to an exception not here material, provides: "The term 'officer' shall mean any person occupying a position identified as an office in the constitution of the labor organization * * *." It may be noted that the conclusion that the International Trustees were not officers was made notwithstanding two earlier decisions of the Board which held that the trustees of U. E. R. & M. W. A. locals were officers within the meaning of the statute, *Compliance Status of Local No. 1150, U. E. R. & M. W. A.*, 96 NLRB 1029; *Compliance Status of U. E. R. & M. W. A. (UE), Local 1421*, 107 NLRB 147.

The Board's own regulation appears inconsistent with its conclusion. As noted, this regulation provides that an officer is one occupying a position identified as an office in the labor organization's constitution. Thus, the designation "officer" is not confined to one of the very few persons who hold highest rank and perform executive functions at the highest level. It includes those who hold positions of responsibility and trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution. While the International's constitution does not confer the title "officer" upon District Secretaries and Trustees or describe their respective positions as "offices," that instrument does expressly designate that District Secretaries shall be members of the International's General Executive Board, does create the position of International Trustee, and sets forth clearly the duties

which the persons who occupy these positions are to perform. The constitutional source of these positions establishes, in large measure, their distinguishing characteristics and renders untenable the Board's argument that if District Secretaries and Trustees of the International are liable to file non-communist affidavits, such affidavits would also be required of organizers, stewards and other lower-level union functionaries.

The District Secretaries, pursuant to Article 10 of the International's constitution, together with the General President, General Secretary-Treasurer, Director of Organization, and the twelve General Vice-Presidents—all of whom are regarded by the Labor Board as officers—are members of the General Executive Board. This body exercises general supervisory and policy making powers. In these important areas, as one of the twenty-seven members of the General Executive Board, a District Secretary can exert as much control, direction and influence as any one of the executive officers or General Vice Presidents. According to the controlling interpretation of the purpose of 29 U. S. C. A. § 159(h), contained in *American Communications Assn., C. I. O., et al.* v. *Douds*, 339 U. S. 382, the non-communist affidavit requirement is directed at persons "when, as officers, they direct union activities" (page 407), or, as alternatively phrased in Mr. Justice Frankfurter's concurring statement, at persons "who hold position of official power" (page 418). The District Secretaries are in this category; therefore, we hold that they are officers. *Sunbeam Corporation*, 98 NLRB 525, relied upon by the Board, discloses nothing which would impel or even be persuasive of a different conclusion.

The International Trustees are not members of the General Executive Board, and the incidents of their positions differ in several respects from those of the other officers. Nevertheless, we hold that they, too, are officers. By Article 9 of the International's constitution, the three Trustees (there is also one Alternate) are to take charge of

the International's property, audit all of its books and records and report to the convention, by which they are elected. Also, the Trustees are the persons to whom the procedure for recalling general officers of the International is entrusted. The duties and functions of the International Trustees closely parallel those performed by the local union trustees at the local level. As noted above, the Board has twice determined that the trustees of U. E. R. & M. W. A. locals are officers. Rather than being "inapposite," we think that a valid analogy may be drawn between the two situations, and that the results in the compliance proceedings reported at 96 NLRB 1029 and 107 NLRB 147 reinforce the conclusion that the International Trustees are officers.

By disposing of this petition for review for reason of non-compliance of the District Secretaries and Trustees with 29 U. S. C. A. § 159(h), we find it unnecessary to decide whether District Council 11 of the U. E. R. & M. W. A. is a labor organization. Similarly, we do not pass upon the larger question concerning the alleged impropriety of the inclusion of the timekeepers in the bargaining unit with the production and maintenance employees. Such an issue would be ripe for judicial review, if at all, only upon a record free from the invalidating circumstance of non-compliance.

The petition to review, set aside and vacate the involved order is allowed. It follows that the Board's request for enforcement is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11403. OCTOBER TERM, 1955, APRIL SESSION, 1956.

[CAPTION.]

June 15, 1956.

Before MAJOR, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition to review and set aside an order of the National Labor Relations Board (respondent), entered January 28, 1955, against Goodman Manufacturing Company of Chicago, Illinois (petitioner). By the Board's order petitioner was found guilty of an unfair labor practice, in violation of Section 8 (a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. A. Section 158 (a)(5) and (1), because of its refusal to bargain with United Electrical Radio and Machine Workers of America (hereinafter referred to as the International Union) as exclusive representative of certain of petitioner's employees in a unit which the Board had determined to be appropriate. Petitioner was ordered to cease and desist from such unfair labor practice and to take the customary affirmative steps to give effect to the Board's order. By answer the Board requests enforcement of its order.

The employees in dispute and about whom the controversy on the merits revolves are certain timekeepers employed by petitioner. Throughout these proceedings petitioner has sought to justify its refusal to bargain on two grounds: (1) that such timekeepers were improperly placed in a bargaining unit with certain production and mainte-

nance workers, and (2) that the International Union was not in compliance with Section 9 (h) of the National Labor Relations Act (39 U. S. C. A. Sec. 159 (h)).

The unfair labor practice charge upon which the complaint issued was filed by Local 1150, United Electrical Radio and Machine Workers of America (hereinafter referred to as the Local Union) on November 19, 1952. The factual situation is somewhat confused because there are affiliated with the International Union geographical district organizations (District 11 is here involved), each of which has a governing body known as the District Council (District Council 11 is here involved), together with Local Unions which receive their authority either from the appropriate District Council or the International Union or both. In addition to petitioner's contention that the unit determined by the Board was not appropriate and that the International was not in compliance with Sec. 9 (h), it contends that District Council 11 was a labor organization within the terms of the Act and that it also was not in compliance. This latter contention, as well as the others, was decided by the Board adversely to petitioner.

It now appears definitely settled that non-compliance with Sec. 9 (h) may in an appropriate case be raised as a defense to an unfair labor practice complaint and that when so raised it is jurisdictional. *N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *N. L. R. B.* v. *Dant et al.*, 344 U. S. 375; *N. L. R. B.* v. *Atlanta Metallic Casket Co.*, 205 F. 2d 931. Thus we need not be concerned with other defenses raised by petitioner until and unless this jurisdictional issue is decided adversely to it.

This court, on November 10, 1955, rendered an opinion in which it held that the International Union was not in compliance with Sec. 9 (h), which resulted in a judgment setting aside and vacating the order under attack and, consequently, a denial of the Board's request for enforcement. At the time of our decision there was pending be-

fore the Supreme Court the case of *N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, on the issue of non-compliance, on certiorari from the Court of Appeals of the Sixth Circuit, which had decided the issue adversely to the Board (219 F. 2d 441). The Supreme Court, on February 27, 1956, rendered its opinion reversing the decision of the Court of Appeals (*N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, 350 U. S. 264). On March 3, 1956, the Board, contending that our decision was in conflict with that of the Supreme Court, filed its motion to vacate our judgment and to reinstate the case for further consideration. Over petitioner's contrary contention, the Board's motion was allowed. At the same time a motion by International and Local Union 1114 (successor to Local Union 1150) to become a party to the proceeding by intervention was denied. The International and the Local Unions were granted leave, however, to appear as *amicus curiae* in any subsequent proceeding. All parties, including the Unions as *amicus curiae*, have filed briefs and participated in oral argument confined to the question as to the impact, if any, which the Supreme Court decision had upon our decision.

The controversy as it relates to the issue of non-compliance revolves around the "trustees" and "secretaries" of the International Union. Petitioner contends that they are officers of such Union and required under Sec. 9 (h) to file the non-communistic affidavit, while the Board and the Unions assert to the contrary. Notwithstanding that all parties profess to discern support in the Supreme Court decision for their respective positions, all must agree that two questions were decided by the Supreme Court, (1) that an employer may under some circumstances challenge in an unfair labor practice proceeding the determination of the Board that a labor organization is not in compliance with Sec. 9 (h) of the Act, and (2) that the Board's definition of the term "officer" as set forth in Sec. 102.13 (b)(3) of the Board's rules and regulations is a valid definition of that term within the provisions of the Act. The decision

an employer can question the necessity of compliance a reiteration of the Court's previous holding in *L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322.

There is no dispute as to the facts in the instant situation under the decision of the Supreme Court in the *Coca-a* case there remains for decision the sole question as whether the "trustees" and "secretaries" of the Inter-ional Union were officers. This much is conceded by the ard and the Unions. The Board's regulation, approved the Supreme Court, provides so far as here material, e term 'officer' * * * shall mean any person occupying osition identified as an office in the constitution of the or organization * * *." This brings us to the question to whether "trustees" and "secretaries" occupy positions entified" as an office in the constitution of the Interna-nal Union.

The important provision in International's constitution Article 5, which is as follows:

"Section A. The Officers of the United Electrical, Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

"A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one Alternate shall also be elected.

"Section B. The General Officers and Trustees, with the exception of the Sergeant-at-Arms, shall be nominated and elected by the International Convention. Nominees shall be good standing members of this union for one year or longer.

"Section C. The terms of the General Officers and General Vice-Presidents shall end October 31st, and

> the Trustees and the General Executive Board shall have all records of the convention in order that the business of the Union shall function in an orderly manner from November 1st."

The Board and the Unions contend that in ascertaining the persons "occupying a position identified as an office," only the first paragraph of Section A is relevant, in other words, that we must close our eyes to all other provisions, not only those contained in Article 5 but in other articles of the constitution. With this contention we do not agree. It is true, of course, that "trustees" and "secretaries" are not specifically designated as officers, but it is provided that "trustees" shall be nominated and elected by the International convention, and that "secretaries," in addition to other designated officials, are members of International's Executive Board. The Supreme Court in the *Coca-Cola* case stated (page 269), "'Officer' normally means those who hold defined offices." Obviously this definition does not purport to be exclusive but, even if it did, it is our view that "trustees" and "secretaries" hold an identified office. Certainly, to use the Supreme Court's illustration, they are not "boys in the back room or other agencies of invisible government." The Board's regulation does not require that the position occupied be specifically designated or named as an office but only that it be identified as such, which carries a broader meaning.

The specific requirement contained in Article 5, that the "trustees" be nominated and elected by the International convention at the same time and in the same manner that those designated as General Officers are elected, carries a strong connotation that the "trustees" are to be elected to an office. More than that, by Article 5 "secretaries" the same as other General Officers are specifically designated as members of the Executive Board of the International Union. In our view, the most favorable appraisement which can be made of Article 5 from the standpoint of the Board

and the Unions is that it is capable of raising a doubt as to whether the positions of "trustees" and "secretaries" are "identified as an office." More specifically, the Article as it relates to the issue under discussion is ambiguous.

Such being the situation, we think it proper to resort to other provisions of the constitution for the purpose of ascertaining the official authority or power bestowed upon "secretaries" and "trustees." See *American Communications Assn. et al.* v. *Douds*, 339 U. S. 382, 407-418. Also, we think that the recognition accorded "secretaries" and "trustees" by the International Union is relevant.

Article 9 of the constitution provides:

> "* * * The duties of the Trustees shall be to audit all books and records of the International Office quarterly, or by order of the General Executive Board; to take inventory at least once a year, and safeguard all the properties of the Union and make their report at the convention. * * *"

The "trustees" act as administrators of the procedure for the recall of General Officers of the International Union. This procedure is set forth in Article 11 of its constitution. In the proceedings of the 1951 convention of the International Union, "trustees" were recognized as officers and elected by ballot, as were all other officers. The President of the International Union on the floor of the convention stated that the meeting was open for nominations for "the office of trustee." The International Union evidently regarded Article 5 of its constitution as ambiguous because at its 1952 convention it was amended. The explanation for the amendment, as made by the chairman of the constitution revision committee, was as follows, "The reason for this is that in Article 5 all of the officers are jumbled together and they are picked up again in a series of articles later on, and the attempt is to deal with the general officers in one section and their duties, to deal with the General Executive Board, General Vice-Presidents and their duties,

and thirdly to deal with the Trustees and their duties into three separate items that now contain reference to those provisions. * * *" We agree with the statement, "in Article 5 all of the officers are jumbled together." More than that, this statement appears to be a clear recognition that "trustees" were regarded as officers and that a distinction was made between Gneral Officers and other officers, including "trustees," all referred to in Article 5.

Article 10 of the constitution in great detail sets forth the powers and duties of the General Executive Board. Such powers, as might be expected, relate to every facet of management and control of the International Union as well as its affiliated District Councils and Local Unions. Its power and authority encompass both the policy making and administrative fields. The constitution provides for 27 members of the Executive Board, of whom 12 are District Secretaries. Thus it is evident that "secretaries" as members of this Executive Board are in a position to wield much influence in the formation as well as in the execution of Union policy at its highest level. A "secretary" has the same power in this top policy making group of International as its President, Vice-President or any other official. The powers and duties conferred by the constitution upon "secretaries" and "trustees," together with the character of recognition given them by the International Union, strongly support the conclusion that they under Article 5 of the constitution hold a position "identified as an office."

We are aware, of course, that in the *Coca-Cola* case the employer offered proof as to the duties and functions of a certain person for the purpose of showing that he was an officer of the Union. The Board refused to consider such testimony and for that reason the case was reversed by the Court of Appeals. The Supreme Court sustained the Board's position on this point, referring to the proffered testimony as embodying a "functional test" which it held improper (page 268). We are not here concerned with the performance of duties and functions but with the power of

those asserted to be officers as fixed in the constitution of the International Union, together with the recognition accorded by the International Union itself to those asserted to be officers. It also may be noted that a reading of the opinion of the Supreme Court and that of the Court of Appeals fails to disclose that the alleged officer or the office which he was alleged to hold was named in the Union constitution there under consideration, while here "trustees" and "secretaries" are named. In any event, the situation here is distinguishable from that before the court in the *Coca-Cola* case.

It is, therefore, our view that the decision of the Supreme Court in *Coca-Cola* does not impair the result which we reached in our previous opinion rendered November 10, 1955. That opinion, however, is ordered to be withdrawn and this opinion substituted therefor. We reiterate our previous holding that the "secretaries" and "trustees" of the International Union are officers within the scope and intendment of Sec. 9 (h) of the Act, as well as the Board's regulation. Admittedly, such officers filed no affidavit and the International Union was not in compliance. It follows that the petition to review, set aside and vacate the order under review is allowed, and that the Board's request for its enforcement is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

Decisions of the National Labor Relations Board

UNITED STATES OF AMERICA

Before The National Labor Relations Board

(Caption—No. 13-CA-1292)

DECISION AND ORDER

(Dated January 28, 1955)

After a charge duly filed by Local 1150 in this case and a complaint issued thereon alleging that the Respondent had committed violations of Section 8 (a) (5) and (1) of the Act, the Respondent filed with the Board a motion to redetermine the compliance status of Local 1150's International Union, (United Electrical, Radio and Machine Workers of America) and for dismissal of the complaint pending against it upon the ground, *inter alia*, that the International's trustees were officers and that the individuals filling these positions had failed to file affidavits required of officers by Section 9(h) of the Act.[1] Whereupon, the Board, on June 24, 1953, issued a Notice to Show Cause, ordering the International to show cause why the Board should not administratively determine that the International was not in full compliance for the reason just stated. The International timely filed an answer to the Notice to Show Cause and the Respondent filed a

[1] The Respondent also raised the same issues of compliance in its answer to the complaint, in which it admits refusing to bargain with the International Union but defends upon the grounds of noncompliance by the Union and its affiliates and also upon the ground that the unit found by the Board in the prior representation proceeding (Case No. 13-RC-2761) is inappropriate.

reply memorandum to the International's answer. Thereafter, on August 6, 1953, the Board issued its Order and Administrative Determination of Compliance Status ordering that, good cause having been shown by the International why the Board should not determine that its trustees were and are officers, Respondent's motion in all respects be denied.

On August 31, 1953, a hearing was held on the merits in this case before Trial Examiner Robert L. Piper. On January 8, 1954, the Trial Examiner issued his Intermediate Report finding that the Respondent had engaged and was engaging in certain unfair labor practices within the meaning of Section 8 (a)(5) and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings and conclusions of the Trial Examiner with the following additions:

In its exceptions to the Intermediate Report, the Respondent, *inter alia*,[2] affirmatively alleges that District 11 of the United Electrical, Radio and Machine Workers of America, (the District with which Local 1150 and the UE International are affiliated), is a labor organization not

[2] The Respondent continues to argue in its exceptions that the Board erred in its unit finding in the prior representation proceeding in this matter. As this issue was fully litigated and considered by the Board in the representation proceeding, in the absence of evidence which was newly discovered or unavailable to the Respondent at the time of the representation hearing, it is clear that such issue is not properly the subject of relitigation in the instant proceeding. *Clarostat Manufacturing Company, Inc.*, 107 NLRB No. 156. Accordingly, we find no merit in this exception.

in compliance with the filing requirements of Section 9 of the Act, and that for this reason the complaint should be dismissed. Because this specific contention was not considered in the above-mentioned Board's Order and Administrative Determination of August 6, 1953, the Board on April 12, 1954, issued a Notice to Show Cause why it should not administratively determine that District 11 is a labor organization which should comply with the filing requirements of Section 9 of the Act for Local 1150 and the UE to be in full compliance. Both District 11 and the Respondent filed answers to the Notice to Show Cause. This particular issue has been considered together with a similar issue in another case [3] which also involved a District (District 9) of the United Electrical, Radio and Machine Workers of America, and upon which issue a lengthy hearing was held. In that case, the Board found that District 9 was not a labor organization within the meaning of the Act and for that reason its officers were not required to comply with the filing requirements of Section 9 of the Act in order for affiliated locals and the UE to be in full compliance. We take judicial notice of the fact that the character and function of District 11, here involved, are the same as that of District 9 involved in the *Magnavox* case. Accordingly, for reasons stated in the *Magnavox* case, we find that District 11 is not a labor organization within the meaning of the Act and therefore its officers are not required to comply with the filing requirements of Section 9 of the Act in order for Local 1150 and the U.E. to be in full compliance. Because it appears that both Local 1150 and its affiliate, United Electrical Radio and Machine Workers of America are in compliance with the filing requirements of the Act and that the unit involved is appropriate for purposes of collective bargaining, we find that the Respondent has violated Section 8 (a) (5) and (1) of the Act by its admitted refusal to bargain with the United Electrical Radio and Machine Workers of America. Accordingly, we shall issue our usual 8 (a) (5) (1) order.

[3] *Magnavox Company*, 111 NLRB No. 64.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Goodman Manufacturing Company, a corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the United Electrical Radio and Machine Workers of America as the exclusive representative of all the employees in the appropriate unit; and

(b) In any other manner interfering with the efforts of the United Electrical Radio and Machine Workers of America to negotiate for, or to represent, the employees in the appropriate bargaining unit as their exclusive bargaining agent.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon the request, bargain collectively with United Electrical Radio and Machine Workers of America as the exclusive representative of the employees in the appropriate unit.

(b) Post at its plant at Chicago, Illinois, copies of the notice attached hereto and marked Appendix.[4] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall after being signed by Respondent's representative be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

[4] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

Respondent to insure that said notices are not altered, defaced or covered by any other material; and

(c) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Order what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., January 28, 1955.

GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

> We Will bargain collectively upon request with United Electrical Radio and Machine Workers of America as the exclusive representative of all employees in the bargaining unit described herein with respect to wages, rates of pay, hours and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.
>
> The bargaining unit is:
>
> > All production and maintenance employees including group leaders, coal passers, firemen and maintenance men, woodworkers, shellac men, laborers, factory clerical employees, timekeepers,

and order pickers, but excluding pattern makers and apprentices, tracers, expediters, time study men, draftsmen and other technical employees, operating engineers, office clerical employees, watchmen, guards, foremen, assistant foremen, and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

We Will Not engage in any act in any manner interfering with the efforts of the aforesaid union to negotiate for or represent the employees in the bargaining unit described above.

GOODMAN MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced or covered by any other material.

UNITED STATES OF AMERICA

Before The National Labor Relations Board

ORDER AND ADMINISTRATIVE DETERMINATION OF COMPLIANCE STATUS

(Dated August 6, 1953)

On or about October 27, 1952, the United Electrical Radio and Machine Workers of America, herein referred to as the Union, filed with the Board an affidavit designating as officers the following: General President, General Secretary, Director of Organization, and General Vice-Presidents (Districts 1-12 inclusive). Non-Communist affidavits were filed with the Board by the incumbents of these offices. The Board thereupon certified the Union as being in compliance with Section 9(h) of the Act.

On March 4, 1953, Goodman Manufacturing Company, herein referred to as Goodman, the Respondent in Case No. 13-CA-1292, filed a motion for the redetermination of the compliance status of the Union and for the dismissal of the complaint pending against it upon the ground, among others, that the Union's Trustees were officers and that the individuals filling these positions had failed to file the affidavits required of officers by Section 9(h). On examination of the sufficiency of the Union's compliance, there was some doubt as to whether the Union had improperly failed to designate its Trustees as officers and to file the necessary non-Communist affidavits for them. Accordingly, on June 24, 1953, the Board issued a Notice to Show Cause, ordering the Union to show cause why the Board should not administratively determine that the Union was not in full compliance for the reason just stated.

The Union's answer, which was timely filed on July 6, 1953, has been carefully considered by the Board. On

July 3, 1953, Goodman moved for leave to file a reply memorandum to the Union's answer,[1] and in fact filed such a memorandum on July 13, 1953. Notwithstanding the Union's opposition to the filing of Goodman's reply, we have considered the argument made by Goodman in its reply memorandum.

Section 102.13 of the Board's Rules and Regulations provides, in part, that the term "officer" for the purpose of Section 9(h) of the Act "shall mean any person occupying a position identified as an office in the constitution of the labor organization . . ."

The Union's 1951-1952 constitution, upon which Goodman primarily relies, contained the following provision:

ARTICLE 5

Section A. The Officers of the United Electrical, Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one alternate shall also be elected.

The Union contends, inter alia, that its constitutions clearly differentiate between Trustees and officers. We

[1] In its motion, Goodman further seeks reconsideration of its contention that the Union's District Secretaries are officers of the International Union. We have, in a prior decision, (Sunbeam Corp., 98 NLRB 525) considered and rejected the same contention. Goodman has presented no evidence in this regard to cause us to reverse our prior determination.

agree. We are of the opinion that only the officials referred to in the first sentence of the above Article 5, Section A are officers. This conclusion is buttressed by other provisions in the constitution. Thus, Article 5, Section B of that constitution stated that "The General Officers and Trustees . . . shall be nominated and elected by the International Convention." Furthermore, Article 9 provides for a method of selecting Trustees different from that employed in the selection of officers, and Article 11 provides for Trustees to administer the established procedure for recalling officers. Under these circumstances, we find that the Trustees were not officers of the Union under the 1951-1952 constitution and that, as no substantive changes were effected in the current constitution, the Trustees, a fortiori, are not officers of the Union under the 1952-1953 constitution. In so finding, we regard the Board's decision in Compliance Status of Local No. 1150, UE,[2] relied upon by Goodman, as inapposite.

Accordingly, the Trustees' failure to file in no way effects the Union's compliance status.

It Is Hereby Ordered that, good cause having been shown by the United Electrical, Radio and Machine Workers of America why the Board should not determine that its Trustees were and are officers, Goodman Manufacturing Company's motion in all respects be, and it hereby is, denied.

It Is Further Administratively Determined that the United Electrical, Radio and Machine Workers of America is, and has been, in compliance with Section 9(h) of the Act.

Dated, Washington, D. C., August 6, 1953.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

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[2] 96 NLRB 1029.

APPENDIX D

Statutes and Regulations Involved

1. Section 9(h) of the National Labor Relations Act:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

2. Sections 5(a) and 5(b) of the Administrative Procedures Act:

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

3. Section 102.13(b) of the Rules and Regulations of the National Labor Relations Board:

(b) For the purpose of the rules and regulations in this part, compliance with section 9(h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any

organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" is used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9(h) of the act.

APPENDIX E

Relevant Provisions of the Union Constitution

ARTICLE 5

Section A. The Officers of the United Electrical Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one Alternate shall also be elected.

Section B. The General Officers and Trustees, with the exception of the Sergeant-at-Arms, shall be nominated and elected by the International Convention. Nominees shall be good standing members of this union for one year or longer.

Section C. The terms of the General Officers and General Vice-Presidents shall end October 31st, and the Trustees and the General Executive Board shall have all records of the convention in order that the business of the Union shall function in an orderly manner from November 1st.

ARTICLE 9

Section A. The four nominees for Trustees receiving the highest number of votes in their consecutive order shall be declared as three Trustees and Alternate respectively.

Section B. The duties of the Trustees shall be to audit all books and records of the International Office quarterly, or by order of the General Executive Board; to take inventory at least once a year, and safeguard all the properties of the Union and make their report at the convention. The trustees shall elect one of their number who will make the report at the convention in the name of the trustees. All trustees to receive copies of the convention minutes, so that financial statements given at the convention agree with copy that each trustee shall receive at the time the yearly audit is made.

* * * * * *

ARTICLE 11

Section A. Any local in good standing may initiate a petition for the recall of any General Officer by the following procedure. The local initiating the petition must first receive official endorsement from the other locals comprising twenty-five (25%) per cent of the total membership involving not less than three (3) locals, as determined by the paid per capita on the average of the three previous months, before submitting petition to the Trustees through the International Office. The Trustees shall then order the petition to be sent to every local in good standing, which shall take an aye and nay vote upon sustaining the recall. All local action pertaining to initiation of petition for recall and all local action on sustaining of recall shall be acted upon at a special meeting. Locals shall return the officially sealed result to the Trustees within forty-one (41) days of receiving same. The Trustees shall then announce result of vote to locals.

Section B. The local initiating petition must first receive official endorsement from the other locals comprising twenty-five (25%) per cent of the total membership within the officially prescribed geographical districts (as determined by paid per capita of the average of the three (3) months previous) before submitting petition to the Trustees through the International Office. The Trustees shall then order petition to be sent to every local in good standing, which shall take an aye and nay vote upon sustaining the recall. All local action pertaining to initiation of petition for recall and all local action on sustaining of recall shall be acted upon at a special meeting. Locals shall return the officially sealed result to the Trustees within forty-one (41) days of receipt of same. The Trustees shall announce the result to the locals.